

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)
U.S. Army, (b) (6))
HHC, U.S. Army Garrison)
Joint Base Myer-Henderson Hall)
Fort Myer, Virginia 22211)

**RULING: DEFENSE
MOTION TO COMPEL
GRAND JURY TESTIMONY**

DATED: 25 April 2012

Defense moves the Court to Compel the Government to produce the entire grand jury proceedings in relation to PFC Manning or Wikileaks IAW RCM 701(a)(2) as material to the preparation of the defense or, in the alternative, moves the Court to order the testimony produced for *in camera* review to determine whether the evidence is discoverable under RCM 701(a)(2). If the Court determines that grand jury testimony is not in the possession, custody, or control of military authorities, the Defense moves the Court to order production of the entire grand jury investigation under the “relevant and necessary” standard. The Government opposes on the grounds that FBI files are classified, DOJ files relating to the accused and Wikileaks are law enforcement sensitive and contain grand jury information, and that the prosecution has no authority to produce any FBI or DOJ files that have not already been produced to the defense.

Findings of Fact.

1. The FBI participated with CID in a joint investigation of the accused. CID was to the lead agency with respect to the investigation concerning the accused.
2. There has been (one or more) grand jury investigation(s) involving Wikileaks.
3. The Government has access to the FBI investigation files and the grand jury proceedings for the purpose of reviewing them for favorable information material to guilt or punishment that must be disclosed to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963).

The Law.

1. Grand jury proceedings are not discoverable under RCM 701. Such proceedings are not books, papers, documents, photographs, tangible objects, or places IAW RCM 701(a)(2), nor are they within the possession, custody, or control of military authorities. Neither the Government nor any other military authority has authority to disclose grand jury matter without an order from the district court where the grand jury convened. Fed. R. Crim. P. 6(e)(3)(F).

2. RCM 701(a)(2) is based on Fed. R. Crim. P. 16(a)(1)(E). Fed. R. Crim. P. 16(a)(1)(G)(3) states that Rule 16 does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Fed. R. Crim. P. 6, 12(h), 16(a)(1), and 26.2.

3. Grand jury proceedings are secret. Provisions authorizing limited disclosures are governed by Fed. R. Crim. P. 6(e). The District Court where the grand jury convened may authorize disclosure preliminarily to or in connection with a judicial proceeding. A petition to disclose a grand-jury matter must be filed in the district where the grand jury convened. Fed. R. Crim. P. 6(e)(3)(E)(i) and (F).

4. As the FBI and DOJ are aligned law enforcement agencies who have participated in a joint investigation of the accused, the Government has a duty to review such investigatory files maintained by the FBI and DOJ, to include grand jury matter, for exculpatory *Brady* material and disclose the existence of such material to the Defense. If such files are under the control of another government entity, Trial Counsel must make that fact known to the Defense and engage in "good faith efforts" to obtain the material. *U.S. v. Williams*, 50 M.J. 436 (CAAF 1999).

5. RCM 914 (Production of Statements of Witnesses) provides that after a witness testifies on direct examination, the party who called the witness is required to produce any prior statements by the witness examination and use by the other party. Statements include those made by a witness to a Federal grand jury. RCM 914(f)(3).

6. Federal courts require parties seeking access to grand jury transcripts to show a particularized need and that the material they seek is necessary to avoid a possible injustice, the need for disclosure is greater than the need for continued secrecy, and the request is structured to cover only material so needed. *See U.S. v. McDavid*, 2007 WL 926664 (E.D. CA 2007); *U.S. v. Upton*, 856 F. Supp. 727 (E.D.N.Y. 1994).

Conclusions of Law.

1. Grand jury matter is not discoverable under RCM 701.

2. The Government is required to access and examine any grand jury investigation germane to the accused for exculpatory *Brady* information and disclose the existence of such information to the defense.

3. The Government is required to disclose prior grand jury statements of any government witnesses who testify IAW RCM 914. Although the rule does not require the Government to disclose such statements until after the witness has testified under direct examination, the Court will exercise its discretion under RCM 801(a)(3) to set a reasonable deadline for such disclosure in advance of trial.

4. The defense moved the Court to compel the production of the entire grand jury investigation as relevant and necessary under RCM 703(f). The defense has not demonstrated a basis for relevance and necessity, much less the particularized need required to access grand jury transcripts.

Ruling: The Defense motion to Compel production of the entire grand jury investigation involving the accused and Wikileaks is **DENIED**. The Government will examine such grand jury investigation(s) for exculpatory *Brady* material and for prior statements required to be produced under RCM 914 and will take appropriate steps under Fed. R. Crim. P. 6(e) to disclose such information to the Defense.

So Ordered this 25th day of April 2012.



DENISE R. LIND
COL, JA
Chief Judge, 1st Judicial Circuit